(2)

Court, U.S.
FILED

No. 041016 DEC "6 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

In re RAYMOND L. SCHLAGEL

Petitioner

v.

DOW CORNING CORPORATION

UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition For Writ of Mandamus
To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF MANDAMUS

RAYMOND L. SCHLAGEL
64 W. Cobblestone Ct.
Florence, KY 41042
(859) 594-4103

Pro se

QUESTIONS PRESENTED FOR REVIEW

Should Petitioner, Raymond L. Schlagel, also Petitioner in U.S. Court of Appeals For The Sixth Circuit Case # 04-3838, in which he appealed a Department of Labor Administrative Review Board decision, be granted his right to have the full and prior record from the U.S. DOL Administrative Review Board be provided to the Court of Appeals for the sake of being heard on all the evidence?

PARTIES

Raymond L. Schlagel
Petitioner

U.S. Department of Labor
Respondent

United States Court of Appeals For the Sixth Circuit
Respondent

Dow Corning
Respondent

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PRIOR OPINIONS AND ORDERS

The appellate clerk's order and Court of Appeal's constructive denial of Petitioner's motion(s) to have the full record certified and filed. Appendix, at A-1-, and A-7-.

JURISDICTION

The clerk entered its order denying the full record be filed on August 19, 2004. To date, the Court of Appeal's constructive denial ordering the full record be filed has occurred over 145 days after the petition for review was docketed on June 28, 2004.

Jurisdictional basis for the Sixth Circuit is 42 U.S.C. § 7622, 15 U.S.C. § 2622, and Fed. R. App. 15.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS

Article V, United States Constitution in pertinent part provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATUTES, REGULATIONS, AND RULES INVOLVED

The provision of both 15 U.S.C. § 2622(c) and 42 U.S.C. § 7622(c) for an appeal to a Court of Appeals provides:

> ... Review shall conform to chapter 7 of title 5. ...

The final paragraph of Title 5 U.S.C. § 706 provides:

> ... In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Other relevant provisions require the agency to properly file the record. They are 28 U.S.C. § 2112 and 28 U.S.C. § 2346. 28 U.S.C. § 2346 states:

> Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

A provision included in 28 U.S.C. § 2112(b)(3) is:

> ... The agency ... if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

The provision of the Federal Rules of Appellate Procedure relevant to this petition is FRAP 17. Included in this provision is FRAP 17(b)(c):

> The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

The provision of the 6th Circuit Rules relevant to this petition is 6 Cir.R.45(b). It states:

> **Reconsideration.** Any party adversely affected by an order entered by the clerk shall be entitled to a reconsideration thereof by a judge or judges of this Court if, within 10 days of service of notice of the entry of such order, such party files a motion for reconsideration giving the grounds therefor.

STATEMENT OF THE CASE

Procedural History

Petitioner, Raymond L. Schlagel, was an employee of Dow Corning Corporation for over ten years, from May 1989 until Nov 10, 1999. Petitioner, a Project Engineer, by e-mail had voiced environmental concerns and violations occurring at Dow Corning's Carrollton, Kentucky plant site, to Dow Corning CEO Gary Anderson, and others. Dow Corning promptly suspended Petitioner, and his employment was terminated on November 10, 1999.

The Petitioner, on November 22, 1999, under provisions of environmental employee protection laws (15 U.S.C. § 2622, 42 U.S.C. § 7622, and 42 U.S.C. § 9610), filed a timely written complaint with the Occupation Safety and Health Administration (OSHA) of the Department of Labor (DOL). OSHA 15 months later, during February 2001, issued a determination letter, of which was appealed to the Administrative Law Judge (ALJ) of DOL for a hearing (governed by 29 CFR Part 18 and Part 24).

A hearing before the ALJ was held and on June 21, 2002, the ALJ wrote a recommended decision (Case # ALJ 01-CER-1). The recommended decision was appealed to the Administrative Review Board (ARB) of the DOL (governed by 29 CFR Part 24).

The ARB issued their Final Decision and Order (F.D. & O.) on April 30, 2004 dismissing Raymond L. Schlagel's complaint (Case # ARB 02-092). This F.D. & O. was appealed to the U.S. Court of Appeals for the Sixth Circuit on June 28, 2004 per provisions in 15 U.S.C. § 2622 and 42 U.S.C. § 7622. Appendix, at A-6-.

Facts

The agency, in this case the Department of Labor, per Fed. R. App. P. 17 "must file the record within 40 days" with the Court of Appeals. On August 6, 2004, an alleged "Certified List" was filed by the DOL. However, the list filed was not authenticated and was not complete. Petitioner, on August 11, 2004, and per FRAP 17(b)(3) filed a motion to have the whole record filed and properly certified. The clerk, on August 19, 2004, denied this motion and in error has shown this appeal as an appeal from the District Court. Appendix at A-1- and A-4-. Also on August 19, 2004 the briefing schedule was set

and an Order granted allowing Dow Corning to intervene (per Judges Keith, Martin, & Rogers).

On August 24, 2004, and per Sixth Circuit Rule 45, Petitioner filed a Motion to reconsider Clerk's ruling of August 19, 2004. Appendix, at A-7-. Several subsequent documents were filed. However, Petitioner never was served Dow Corning's objections and response to Petitioner's motion for reconsideration. Even after the issue was raised, Petitioner was not provided a copy of the filing. Petitioner, after ordering and receiving a copy from the Court of Appeals, replied to Dow Corning's objections and response. Appendix, at A-15-. In Dow Corning's response, Dow Corning acknowledges that no record was sent, and even alleges that to send the record would be costly and serves as harassment. Dow Corning further requested to the Court of Appeals that they provide the record as needed. Appendix, at A-24-. It is of special note that Dow Corning did not serve Petitioner, and thus seeks to provide a record of their own, and one not properly certified by the DOL.

Petitioner, on appeal is working *pro se*. It is of note that both the DOL and some within the U.S. Court of Appeals for the Sixth Circuit have suggested to Petitioner that for a record to be certified (properly authenticated), it must be sent by "certified mail". To address this obvious error a letter was sent to Chief Judge Danny J. Boggs on October 27, 2004. Appendix, at A-22-.

To date, the Petitioner's motion for reconsideration or specifically of his right to be heard on the full record, has not been decided. It is well over 145 days since the case has been docketed. It is standard procedure that once the full record is requested by any of the parties, that the Court of Appeals then requires that it be provided.

The alleged list filed by the DOL on August 6, 2004, although not certified, also had numerous documents not listed, including; a) the affidavits of Dow Corning's CEO

Gary Anderson and V.P. & Chief Human Resources Officer Burnett Kelly (both affidavits were filed with DOL during OSHA investigation), b) documents filed prior to July 6, 2000 of which included original complaint of November 22, 1999, and, c) other documents known to be of record filed by Petitioner and/or his counsel. Petitioner on appeal expects to use these same documents of record to show how the DOL decision grossly contradicts Dow Corning's own statements. It is of note that Dow Corning's Carrollton Plant Site is a DOL OSHA VPP Star site, OSHA's highest such award. Thus, the DOL has limited impetus to either cite this site for discrimination and/or provide the record.

Argument

Pursuant to Fed. R. App. P. 17, Title 5 U.S.C. § 706, Title 28 U.S.C. § 2112, and Title 28 U.S.C. § 2346 the whole record is to be provided by the agency, in this case the Department of Labor, to the reviewing court. The appellate record is clear, in which Dow Corning has also admitted, the agency record has not been properly filed.

Petitioner, the sole earner of a family of seven, to date, has constructively been denied due process. Pursuant to 29 CFR § 24.8 (c), the time allotted for the DOL ARB for final adjudication is 90 days of initial complaint. The initial complaint was filed November 22, 1999, and the final decision was issued on April 30, 2004. Although the statute is construed as directory in nature, the Petitioner has already been denied an expeditious DOL proceeding, of no fault of his own. Because of the whistleblowing complaint, the Petitioner can not now find employment. By the DOL not filing the record and by the U.S. Court of Appeal for the Sixth Circuit not ordering the record be sent, Petitioner has been

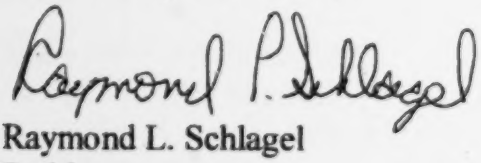
constructively denied his constitutional rights per Article V, and Article XIV, Section 1, of due process, as Petitioner is denied his timely right to overturn the DOL's final decision and thus have employment.

This writ is of imperative public importance, as it serves to state the required practice of a parties right to be heard on the full record, and that the full record be promptly filed. The Court of Appeals has deviated from standard procedure, and has constructively denied Petitioner the right to the full record, as it never ordered the full record be provided. There is no just cause to delay Petitioner's right to the full record and thus an expeditious appeal.

PRAYER

For the foregoing reasons, the Petitioner respectfully prays that a writ of mandamus be issued by this Court directed to both the U.S. Court of Appeals for the Sixth Circuit, and the DOL Administrative Review Board requiring that the full record of Case # ARB 02-092 be promptly and properly filed with the U.S. Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



Raymond L. Schlagel
Petitioner, *pro se*
64 W. Cobblestone Ct.
Florence, KY 41042
(859) 594-4103

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECEIVED
AUG 11 2004
LEONARD GREEN, Clerk

FILED
AUG 11 2004
LEONARD GREEN, Clerk

RAYMOND L. SCHLAGEL
Petitioner

vs. **CASE NO. 04-3838**

U.S. DEPARTMENT OF LABOR
Respondent

MOTION DENIED
FILED 8/19/04
BY THE CLERK PURSUANT TO
RULE 45 (a) SIXTH CIR. RULES
s/ Leonard Green / rld
CLERK
COPIES MAILED 8/19/04

MOTION FOR ENTIRE RECORD & STAY PENDING RECEIPT OF RECORD

Now comes Petitioner Raymond L. Schlagel, and moves this Court for entry of an Order requiring the U.S. Department of Labor Administrative Review Board

(agency), pursuant to Rule 17(b) of FRAP, to file a certified copy of the entire record with the circuit clerk.

On August 5, 2004 the agency (DOL, Administrative Review Board) submitted an incomplete list of documents that were filed of record with the U.S. DOL in ALJ (#2001-CER-1) and ARB (02-092) proceedings. The agency, pursuant to Rule 17(b) of FRAP, has failed to provide a certified copy of the entire record or a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record. The agency has failed to state and certify that the list they provided was for all material constituting the record. The Petitioner has not stipulated in writing that a certified partial record or certified partial listing be filed in lieu of the whole record, or a listing of all materials of record.

The documents omitted from the agency's list are advantageous to the petitioner's cause, and are necessary for the Court's review. The omissions include original complaint of 22Nov99, over a dozen of Petitioner's (Complainant's) exhibits, and other filings. They are excessive!

The Petitioner intends to show, and upon by review of the Court, controlled by 5 U.S.C. §§ 706(2)(F), that agency's actions, findings, and conclusions to be unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. To accomplish this, the entire record is required as per FRAP 17(b)(1)(A). Due to the concern that the agency did not provide the entire record as required, the Petitioner requests, pursuant to FRAP 17(b)(3), that the whole record be provided to the Court, and per FRAP 17(b)(1)(A). Further, the Petitioner requests a stay of proceedings until the Court is in receipt of the entire record.

s / Raymond L. Schlagel
Raymond L. Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042
(859) 594-4103

Certificate of Service

I certify that a copy of the foregoing **Motion for Entire Record & Stay** was mailed, postage prepaid, this date of August 10, 2004 to:

Timothy P. O'Mara, Esq.
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202-3410

Carol Arnold
Office of the Solicitor, U.S. DOL
200 Constitution Avenue, N.W.,
Suite N-2716
Washington, D.C. 20210

10Aug04
Date

s / Raymond L. Schlagel
Raymond L. Schlagel

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Leonard Green
Clerk

Robin Duncan
(513) 564-7027
www.ca6.uscourts.gov

Filed: August 19, 2004

Raymond L. Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042

Carol Arnold
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Suite N-2716
Washington, DC 20210

Kenneth S. Handmaker
Middleton & Reutlinger
401 S. Fourth Avenue
Suite 2500 Brown Williamson Tower
Louisville, KY 40202

RE: 04-3838
Schlagel vs. US Dept Labor
District Court No. 02-092

Enclosed is a copy of an order which was entered today in the above styled case.

Robin Duncan
Case Manager

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECEIVED
JUNE 28 2004
LEONARD GREEN, Clerk

FILED
JUNE 28 2004
LEONARD GREEN, Clerk

RAYMOND L. SCHLAGEL)
Petitioner)
)
)
vs.) **CASE NO. 04-3838**
)
U.S. DEPARTMENT OF LABOR)
Respondent)
)

PETITION FOR REVIEW

Notice is hereby given that Raymond L. Schlagel, hereby petitions for review to the United States Court of Appeals for the Sixth Circuit from Final Decision And Order per ARB Case No. 02-092, by the U.S. Department of Labor Administrative Review Board entered in this action on the 30th day of April, 2004.

s / Raymond L. Schlagel
Raymond L. Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042
(859) 594-4103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECEIVED
AUG 24 2004
LEONARD GREEN, Clerk

FILED
AUG 24 2004
LEONARD GREEN, Clerk

RAYMOND L. SCHLAGEL)
Petitioner)
)
)
vs.) **CASE NO. 04-3838**
)
)
U.S. DEPARTMENT OF LABOR)
Respondent)
)

MOTION FOR RECONSIDERATION OF MOTION FOR ENTIRE RECORD & STAY PENDING RECEIPT OF RECORD WITH SCHLAGEL AFFIDAVIT ATTACHED

Now comes Petitioner Raymond L. Schlagel pursuant to 6th Circuit Rule 45 (b) and moves this Court for reconsideration of Motion for Entire Record & Stay Pending Receipt of Record submitted on August 10, 2004 and denied by clerk Leonard Green/rld on August 19, 2004.

MEMORANDUM IN SUPPORT OF MOTION

The grounds in support therefore are:

BACKGROUND

Petitioner Raymond L. Schlagel on August 10, 2004, moved this Court for entry of an Order requiring the U.S. Department of Labor Administrative Review Board (agency), pursuant to Rule 17(b) of FRAP, to file a certified copy of the entire record with the circuit clerk.

On August 5, 2004 the agency (DOL, Administrative Review Board) submitted an incomplete list of documents that were filed of record with the U.S. DOL in ALJ (#2001-CER-1) and ARB (02-092) proceedings. The agency, pursuant to Rule 17(b) of FRAP, has failed to provide a certified copy of the entire record or a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record. The agency has failed to state and certify that the list they provided was for all material constituting the record. The Petitioner has not stipulated in writing that a certified partial record or certified partial listing be filed in lieu of the whole record, or a listing of all materials of record.

The clerk on August 19, 2004 denied Petitioners Motion for Entire Record & Stay Pending Receipt of Record citing Rule 45(a) Sixth Cir. Rules. Also on August 19, 2004 the Briefing Schedule was filed.

The record is clear, no original or certified copy of the entire record or a certified list adequately describing all documents... and other material constituting the record has been filed as per FRAP 17(b)(1). (See attached Affidavit and copy of DOL's listing) Thus, and pursuant to FRAP 17(a) the clerk could not (and did not) notify all parties of the date when the record was filed, as it was not properly filed.

A.) LEGAL ARGUMENT

Pursuant to FRAP 17(b)(1), the agency must file the original or a certified copy of the entire record, or a certified list adequately describing all documents, transcripts of testimony exhibits, and other material constituting the record. Also, pursuant to FRAP 17(b)(3) if a party so requests (in this case the Petitioner) all parts of the record must be sent to the Court regardless of any prior stipulation.

Pursuant to U.S. Code Title 28, Part V, Chapter 133 Review, Section 2112(b)(3), when the entire record is so requested, as is by the Petitioner here, for review, the agency "shall, file in the Court the entire record of the proceedings before it without abbreviation.". It also states if there are questions of the correctness of a finding of fact by the DOL ARB (agency), all of the evidence before the record "shall be included in the record." (See below some items excluded from the alleged August 5, 2004 listing provided by DOL ARB).

The Petitioner intends to show, and upon by review of the Court, controlled by 5 U.S.C. §§ 706(2)(F), that agency's actions, findings, and conclusions to be unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. To accomplish this, the entire record is required as per FRAP 17(b)(1)(A).

B.) PROCEDURAL ISSUES / CLERK IN ERROR

The record is clear that the Department of Labor ARB did not file the record pursuant to FRAP 17(b), thus the clerk could not (and did not) notify Petitioner that the record was received. The clerk at the same time erroneously set up a briefing schedule based on the idea

that the record was filed. Because the briefing schedule is not set up until after the record has been filed, the clerk erred in scheduling the brief minus any correct, certified record. The Petitioner is at an extreme disadvantage when the record has not been filed. The joint appendix (or the question to waive such) can be taken from the record filed. (See attached Schlagel Affidavit)

C.) AGENCY FILING RECORD IS SAME AS RESPONDENT

The agency responsible for filing the record (Department of Labor, Administrative Review Board) is the same as Respondent, Department of Labor.

D.) DEPARTMENT OF LABOR'S EXCESSIVE OMISSIONS / ERRORS

The listing that the DOL filed alleging to be pursuant to Rule 17(b) has blatant omissions and errors. It is evident that the listing was carefully prepared and reviewed to remove items advantageous to Petitioner.

The documents omitted from the agency's list are advantageous to the petitioner's cause, and are necessary for the Court's review. The omissions include the original complaint of 22Nov99, over a dozen of Petitioner's (Complainant's) exhibits, and other filings. They are excessive! (See attached Schlagel Affidavit)

The original complaint of November 22, 1999, that is conspicuously missing, is critical. It is interesting that at one point, it was argued that the complaint was not timely filed. This refutes this argument.

Some of the exhibits omitted can be seen from the alleged certified list item #56. Omitted from this item on the list are Complainant's exhibits #65, and #'s 171-181. (See Schlagel Affidavit attached) Complainant's exhibit

175 was an August 25, 2000 affidavit by Gary Anderson, Dow Corning President and CEO. Complainant Exhibit 174 is a September 5, 2000 affidavit by Burnett Kelly, Dow Corning V.P. & Chief Human Resources Officer. Complainant Exhibit 171 is an extensive chronological timeline of events. Complainant Exhibit 65 is a copy of verbatim notes from John Lackner's (Dow Corning Carrollton Plant Manager) phone message suspending Raymond L. Schlagel. The list of all additional exhibits and documents that were omitted is excessive. All omissions contradict the decision by DOL and/or evidence presented at the hearings. For example, Burnett Kelly of Dow Corning in paragraph 15 of his affidavit states a completely different reason for Petitioners termination than one given by Dow Corning during the 2001 hearing, and eventually accepted by the DOL.

There is clear need for the entire record and for it to be properly certified (stamped with a seal and/or embossed).

CONCLUSION

For these reasons, Petitioner moves the Court to Reconsider Motion for Entire Record and Stay Pending Receipt of Record. Due to the concern that the DOL did not file the record, the Petitioner requests the Court for entry of any Order requiring the U.S. DOL ARB to do so. Further, the Petitioner requests a stay of proceedings until the Court is in receipt of the entire record, one properly certified (stamped with a seal and/or embossed) by the DOL ARB.

s / Raymond L. Schlagel
Raymond L. Schlagel.
64 W. Cobblestone Ct.
Florence, KY 41042
(859) 594-4103

Certificate of Service

I certify that a copy of the foregoing **Motion for Reconsideration of Motion for Entire Record & Stay** was mailed, postage prepaid, this date of August 23, 2004 to:

Timothy P. O'Mara, Esq.
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202-3410

Carol Arnold
Office of the Solicitor, U.S. DOL
200 Constitution Avenue, N.W.,
Suite N-2716
Washington, D.C. 20210

23Aug04
Date

s / Raymond L. Schlagel
Raymond L. Schlagel

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND L. SCHLAGEL	)	
Petitioner	)	
	)	
	)	
vs.	)	**CASE NO. 04-3838**
	)	
	)	
U.S. DEPARTMENT OF LABOR	)	
Respondent	)	
	)	

AFFIDAVIT OF RAYMOND L. SCHLAGEL

Raymond L. Schlagel being first duly cautioned and sworn states as follows:

1. My name is Raymond L. Schlagel. I am the Petitioner in Case No. 04-3838.

2. On August 09, 2004, I received the U.S. DOL's alleged certified list of documents. The list was not properly certified and filed per FRAP 17(b). Attached to this affidavit is a true and correct copy of the listing, received on August 09, 2004 from the DOL ARB.

3. The listing received from the DOL ARB had numerous blatant omissions and errors. Missing were my (Complainant) exhibits 65, 171-181, and etc., original Complaint and so on.

4. My case is severely disadvantaged both financially and physically by not having my right to the entire record.

5. Further, the affiant sayeth not.

s / Raymond L. Schlagel
Raymond L. Schlagel

23Aug04
Date

STATE OF KENTUCKY)
)
COUNTY OF BOONE)

On this 23 day of August , 2004, before me a Notary Public in and for said County, personally appeared Raymond L. Schlagel, and who being known to me and having executed this Affidavit in my presence, stated that for genuine issue as to material fact made this affidavit.

s / Judy K Leever
Notary Public
My Commission Expires: 1/31/07

Notary Public
STATE AT LARGE, KY

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECEIVED
SEP 27 2004
LEONARD GREEN, Clerk

FILED
SEP 27 2004
LEONARD GREEN, Clerk

RAYMOND L. SCHLAGEL
Petitioner

vs. **CASE NO. 04-3838**

U.S. DEPARTMENT OF LABOR
Respondent

PETITIONER'S REPLY TO INTERVENOR'S OBJECTION AND RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION

W/SCHLAGEL AFFIDAVIT OF SEPTEMBER 24, 2004

Now comes Petitioner, Raymond L. Schlagel, and replies to Intervenor's Objection and Response to Petitioner's Motion for Reconsideration filed August 30, 2004.

MEMORANDUM IN SUPPORT OF MOTION

1.) Petitioner, could not have previously filed a reply until now (see attached Schlagel Affidavit of September 24, 2004, #2, and previously filed affidavits of record). It is now most obvious why Dow Corning did not want a reply by Petitioner.

2.) Intervenor suggests supplementing a record that has not been filed as per FRAP 17. It is of note that the DOL, also Respondent, can not state that they are providing a certified list describing all documents but instead states "...that the following documents were filed of record with the U.S. Department of Labor...". Clearly the DOL must authenticate with proper seal the FULL RECORD, not just some documents of record.

3.) Intervenor insists there is no Exhibit 65, however, within their own attachment it states that this same exhibit has been marked and received into evidence. (see attached Schlagel Affidavit of 24Sep04, # 3 and 4). See exhibit 65 and line 18 of page 12 of transcript, both are parts of the affidavit.

4.) Intervenor alleges that exhibit 171 is not a part of the record. However, although exhibit 171 was not a part of the evidence used at the ALJ hearing (Petitioner objected when it was not entered into evidence), it was a part of the record to be used for "de novo" review by the ARB. (see attached Schlagel Affidavit of 24Sep04, #3, 5, 6, & 7). See exhibit 171 which is a part of the affidavit.

5.) Intervenor blatantly alleges that the evidence omitted by the DOL is not relevant, however, Dow Corning is fighting to not allow evidence that already is of record. Obviously these parts of the record are detrimental to Dow Corning's cause, and thus will show Dow Corning did not have a legitimate reason to fire Raymond L. Schlagel, who was rated a top performer.

6.) One must take Dow Corning's response that the DOL is being harassed and serves no purpose as being self serving to both them and the DOL. It is the ARB's

responsibility to provide the Complete Record. (See attached Schlagel Affidavit of 24Sep04, #8).

7.) Petitioner has stated previously that the documents missing from the record included exhibits 65, 171-181, and etc., original Complaint, and so on. Obviously, Intervenor missed these points and failed to address some other items missing from the DOL's alleged certified list. For example, exhibits 205-206 are just two of numerous other documents missing from the record. (Schlagel Affidavit of 24Sep04, #9). Needless to say suggesting that Dow Corning provide the record in lieu of a certified copy from the DOL, is most absurd!

8.) The Petitioner has requested the full record, and is entitled to such. Without the record, briefs can not be adequately presented.

s / Raymond L. Schlagel
Raymond L. Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042
(859) 594-4103

Certificate of Service

I certify that a copy of the foregoing **Petitioner's Reply to Intervenor's Objection and Response ...** was mailed, postage prepaid, this date of September 24, 2004 to:

Timothy P. O'Mara, Esq.
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202-3410

Kenneth Handmaker, Esq.
Middleton & Reutlinger

2500 Brown & Williamson Tower
Louisville, KY 40202-3410

Carol Arnold
Office of the Solicitor, U.S. DOL
200 Constitution Avenue, N.W.,
Suite N-2716
Washington, D.C. 20210

24Sep04 — Date

s / Raymond L. Schlagel — Raymond L. Schlagel

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND L. SCHLAGEL	)	
Petitioner	)	
	)	
	)	
vs.	)	**CASE NO. 04-3838**
	)	
	)	
U.S. DEPARTMENT OF LABOR	)	
Respondent	)	
	)	

AFFIDAVIT OF RAYMOND L. SCHLAGEL /
September 24, 2004

Raymond L. Schlagel being first duly cautioned and sworn states as follows:

1. My name is Raymond L. Schlagel. I am the Petitioner in Case No. 04-3838.

2. I had not received a copy of "Intervenor's Objections and Response to Petitioner's Motion for Reconsideration" filed August 30, 2004, until I had ordered and received a copy from a deputy clerk, of which was received on September 22, 2004.

3. Attached to and a part of this affidavit are true and correct copies of exhibit 65 (page 112), exhibit 171 (pages 421-441), and page 11 thru page 14 of October 2, 2001 transcript (previously presented to U.S. Court of Appeals 6th Circuit).

4. Exhibit 65 was taken verbatim from an audio tape recording, of which still exists.

5. Exhibit 171 is one of numerous documents provided to a whistleblower investigator in January 2000,

at her request to supplement original complaint of Nov 22, 1999, to investigate whistleblowing claims.

6. When appealing the ALJ decision to the ARB, I requested "de novo" review using all previous documents, of which included exhibit 171. Although exhibit 171 was not allowed into evidence during ALJ hearings, preserved was the right to use exhibit 171 later, as an objection was raised when it was not received into evidence (see line 8-9 of transcript page 12).

7. Exhibit 171 was a part of continuing violation issue.

8. DOL OSHA had given Dow Corning its highest rating, that of a VPP Star site. Because of this, I was instructed by a whistleblower investigator, after she became aware of Dow Corning's VPP Star status, that OSHA would not cite Dow Corning!

9. Numerous documents are missing from DOL's alleged certified list, including exhibits 65, 171-181 and etc., original complaint, and so on. Two of the other exhibits are #'s 205 and 206, e-mail notes between Petitioner's supervisor and Dow Corning corporate environmental attorney, dated July 7, 1999 and July 21, 1999.

10. Further, the affiant sayeth not.

s / Raymond L. Schlagel
Raymond L. Schlagel

24Sep04
Date

STATE OF KENTUCKY)
)
COUNTY OF BOONE)

On this 24 day of September , 2004, before me a Notary Public in and for said County, personally appeared Raymond L. Schlagel, and who being known to me and having executed this Affidavit in my presence, stated that for genuine issue as to material fact made this affidavit.

s/ Judy K Leever

Notary Public
My Commission

Expires: 1-31-07

Notary Public
STATE AT LARGE, KY

Raymond L. Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042

October 27, 2004

CERTIFIED MAIL

Chief Judge Danny J. Boggs
United States Court of Appeals for the Sixth Circuit
100 E. Fifth Street, Room 532
Potter Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

Re: Filing the Record, Case No: 04-3838

Dear Honorable Danny J. Boggs,

I am writing per the record in the aforementioned case. I am requesting your help in obtaining expeditious due process.

The aforementioned case was filed June 28, 2004, appealing a previous decision filed from the DOL's Administrative Review Board, per an environmental whistleblowing case in which the Petitioner was fired in November 1999 after he voiced environmental concerns to his corporate CEO. The agency, DOL, after being served, was to file the record with the clerk within 40 days, upon which the clerk must notify all parties when the record is filed.

To date, no record has been filed with the clerk's office and thus no notification was sent to all parties that the record was filed. The alleged "Certified List" filed on 8/6/04, amongst other issues, was not certified and does not meet the requirement of filing the record (see enclosed).

To rectify the situation, the Petitioner filed a motion on August 11, 2004, requesting that the DOL submit the whole record (as allowed by law).

This was denied by the clerk on August 19, 2004. On August 19, 2004, the Court (Judges: Keith, Martin, & Rogers) granted an order allowing an intervenor, and the briefing schedule was set (minus the record). Petitioner on August 24, 2004, filed a motion to reconsider clerk's ruling on 8/19/04. The August 24, 2004 motion and subsequent filings have yet to be decided.

It is well known that the Petitioner is working *pro se*. It seems inappropriate for some within the clerk's office (but not all), and for the DOL, to suggest or state that by sending a non certified list by "certified mail" would indicate that the list is certified. Sending an improper list by "certified mail" does not make a list "certified"! It is most evident that the clerk's office knew the list received was not a proper filing of the record, as evident by no notification made to all parties that a record was filed, as it was not filed.

We bring this issue to your attention so that it can be resolved, so expeditious due process can be served, and that the record be filed promptly. Petitioner is entitled to be heard on appeal per the full record. If there are any questions, I can be reached at the above address. Your prompt attention to this matter would be appreciated.

Sincerely,

s / Raymond L. Schlagel
Raymond L. Schlagel

Enclosure: Alleged Certified List filed 8/06/04

cc: Barbara Burns

Excerpts from page 3 of Dow Corning's INTERVENOR'S OBJECTIONS AND RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION

... Presuming that what we see is what the Department of Labor saw and listed, then requiring the agency to go to the time and expense of producing a full, certified copy of all documents in the record serves no purpose other than harassment, time, and expense. ....

... Intervenor even offers to tender copies of said exhibits into this Court's record if the Court so requests.

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE / AFFIDAVIT OF RAYMOND L. SCHLAGEL, PETITIONER

Raymond L. Schlagel being first duly cautioned and sworn states as follows:

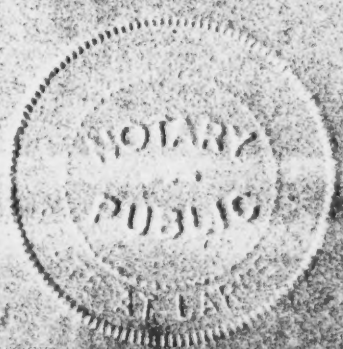
1. My name is Raymond L. Schlagel. I am the Petitioner in U.S. Court of Appeals for the Sixth Circuit, Case No. 04-3838.

2. In compliance with U.S. Supreme Court Rule 29.5 (c) for proof of service, I hereby certify that a true and correct copy of the Petition for Writ of Mandamus has been served by U.S. Mail, postage prepaid, this 30 day of November 2004, to the following:

Carol Arnold (3 copies)
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Suite N-2716
Washington, D.C. 20210
(202) 219-7600

Solicitor General of the United States (3 copies)
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Chief Judge Danny J. Boggs (1 copy)
United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street, Room 532
Potter Stewart, U.S. Courthouse
Cincinnati, OH 45202-3988
(513) 564-7000



Senior Judge Damon J. Keith (1 copy)
United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street, Room 532
Potter Stewart, U.S. Courthouse
Cincinnati, OH 45202-3988
(513) 564-7000

Judge John M. Rogers (1 copy)
United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street, Room 532
Potter Stewart, U.S. Courthouse
Cincinnati, OH 45202-3988
(513) 564-7000

Judge Boyce F. Martin, Jr. (1 copy)
United States Court of Appeals
For the Sixth Circuit
100 East Fifth Street, Room 532
Potter Stewart, U.S. Courthouse
Cincinnati, OH 45202-3988
(513) 564-7000

Kenneth S. Handmaker — Counsel for Dow Corning
Middleton & Reutlinger — (3 copies)
401 S. Fourth Avenue
Suite 2500 Brown Williamson Tower
Louisville, KY 40202
(502) 584-1135

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E. — (original & 40 copies)
Washington, D.C. 20543

3. Per Supreme Court Rule 29.5 (c) and 28 U.S.C. § 1746, I declare and certify under perjury that the foregoing is true and correct.

Raymond L. Schlagel

Raymond L. Schlagel-Affiant

30 Nov 04

Date

STATE OF KENTUCKY)
)
COUNTY OF BOONE)

Sworn to, or affirmed and subscribed in my presence this 30 day of Nov, 2004.

Notary Public
My Commission Expires: 1.31.07